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Is the GTCA's Cap on Inverse Condemnation Awards Constitutional?

By T.P. "Lynn" Howell



EFFECTIVE APRIL 21, 2014, THE OKLAHOMA LEGISLATURE extended the Governmental Tort Claims Act (GTCA) to cover inverse condemnation actions. It did this by expanding the definition of “tort” in 51 O.S. 2011 §152, which is now defined as:

a legal wrong, independent of contract, involving violation of a duty imposed by general law, statute, the Constitution of the State of Oklahoma, or otherwise, resulting in a loss to any person, association or corporation as the proximate result of an act or omission of a political subdivision or the state or an employee acting within the scope of employment.¹

The statute formerly did not contain the underlined language. Ironically, adding that reference to the Constitution may not have been constitutional.

BACKGROUND

The concept of “inverse condemnation”² had been developed by other states and the United States Supreme Court well before Oklahoma became a state. For example, in the 1884 case of *United States v. Great Falls Mfg. Co.*,³ the U.S. Supreme Court ruled that a landowner was entitled to be compensated by the government for a taking caused by a dam. In the 1865 case of *Soulard v. City of St. Louis*,⁴ the Missouri Supreme Court held that a landowner was entitled to be compensated for a taking caused by street construction.

These holdings derived from the constitutional rule that the government shall not take private property without fairly compensating the owner. The Fifth Amendment to the United States Constitution states in relevant part that “private property [shall not] be taken for public use, without just compensation.” The U.S. Supreme Court has noted “this limitation on the exercise of the right of eminent domain is so essentially a part of American constitutional law that it is believed that no State is now without it.”⁵

Following these precedents, courts in Oklahoma had recognized that landowners had the right to be compensated for “takings” of their property even before the Oklahoma Constitution was enacted.⁶ Normally, the government takes property it needs by means of an action in eminent

domain, but where the government has not brought such a proceeding, the landowner can file an action for compensation that has come to be known as “inverse condemnation.”⁷

INVERSE CONDEMNATION ACTIONS BEFORE THE 2014 GTCA AMENDMENT

Before 2014, courts in Oklahoma had held that a condemnation claim is not a tort. “Ordinarily, condemnation proceedings do not involve a tort and are not civil actions at law or suits in equity, but rather are special statutory proceedings for the purpose of ascertaining the compensation to be paid for the property proposed to be appropriated.”⁸ The classification as nontorts applied to both regular and inverse condemnation claims.⁹ “Condemnation proceedings, including inverse

condemnation, do not involve a tort, and are not, strictly speaking, civil actions or suits.”¹⁰

For that reason, before 2014, in at least two decisions the Oklahoma Court of Civil Appeals had held that claims for inverse condemnation were not subject to the GTCA.¹¹ The Oklahoma Supreme Court had apparently not addressed the issue, but the logic – that the GTCA does not apply to a traditionally nontort claim – was sound. Courts in other states had ruled similarly.¹²

We do not know if the Legislature was specifically addressing these precedents regarding inverse condemnation claims when it amended the GTCA or if it was attempting to limit other constitution-based claims against the government, such as civil rights actions, but the effect was the same because a landowner’s right to bring a claim for inverse condemnation is derived directly from the Oklahoma Constitution. Article 2, Section 24 reads in pertinent part as follows:

Private property shall not be taken or damaged for public use without just compensation...

It has long been recognized that this constitutional provision is the antecedent of a property owner’s right to be compensated for the taking of his or her property, whether that is through a regular condemnation proceeding or an inverse condemnation action.¹³ The Oklahoma Supreme Court therefore has held this constitutional provision is “self-executing,” in that it needs no statutory enactment to be effective – it is *independent* of statute. “It is now well settled that the guaranty of section 24, article 2, of our Constitution is self-executing.”¹⁴

It is also well settled that a constitutional right, as opposed to a statutory right, cannot be abrogated or infringed by a legislative enactment. “Where it is proposed

by a statute to deny, modify, or diminish a right or immunity secured to the people by an explicit constitutional provision, the presumption is against the validity of the statute, and the courts should enforce the constitutional provision.”¹⁵

the case based on the developer’s failure to comply with the Utah Governmental Immunity Act (UGIA). As does Oklahoma’s GTCA, the UGIA requires a claimant to first give notice to the governmental entity and then jump through a number of other hoops in order to establish its claim.¹⁸

The most obvious effect of applying the GTCA to inverse condemnation actions is that the GTCA limits the amount a person can recover from the government in a suit under its provisions to \$25,000.

THE IMPACT OF THE GTCA ON INVERSE CONDEMNATION CLAIMS

The most obvious effect of applying the GTCA to inverse condemnation actions is that the GTCA limits the amount a person can recover from the government in a suit under its provisions to \$25,000. That directly conflicts with Article 2, Section 24 of the Oklahoma Constitution, quoted above, which provides that a landowner shall receive “*just compensation*” for his or her property. The recent amendment to the statutory definition of “tort” in the GTCA therefore diminishes a constitutional right.

Other courts have addressed similar statutes. In *Heughs Land, LLC v. Holladay City*,¹⁶ the city of Holladay, Utah, denied the request of Heughs Land, a developer, for approval of a subdivision plat. The developer sought review of that decision by filing a case in the district court, calling the city’s ruling a “taking” without compensation.¹⁷ The court dismissed

The developer argued on appeal that its “right to recovery under the Utah Constitution may not be modified or restricted by the UGIA because article I, section 22 of the constitution [providing for just compensation for property taken by the government] is self-executing.”¹⁹ The Utah Court of Appeals *agreed*, noting that “if a statutory enactment contravenes any provision of the constitution, the latter governs.”²⁰

Other states have made consonant rulings – that a governmental tort claims act cannot infringe upon the constitutional right to be compensated for a governmental taking. In *Greenway v. Borough of Paramus*,²¹ the New Jersey Supreme Court held that New Jersey’s Tort Claims Act did “not apply to inverse condemnation claims” because “statutes cannot abrogate constitutional rights.”²² In *Moore Real Estate, Inc. v. Porter County Drainage Bd.*,²³ the Indiana Court of Appeals ruled that a government agency “may not use a state statute,

the tort claims act, to trump the constitutional rights” of a landowner to recover in an inverse condemnation action.²⁴ In *Electro-Jet Tool Mfg. Co. v. City of Albuquerque*,²⁵ the New Mexico Supreme Court held that “legislation such as the Tort Claims Act cannot override a constitutional guarantee like that contained in Article II, Section 20,” granting the right to recover just compensation for property taken by the government.²⁶

CONCLUSION

Limiting a person’s right to fair compensation for a governmental taking of his property by subjecting that right to the provisions of the GTCA is unconstitutional. The Legislature should not be able to cap the damages for the taking of a landowner’s property at \$25,000 when the land may actually be worth far more.

ABOUT THE AUTHOR

Thomas Pitchlynn “Lynn” Howell is an attorney with the Oklahoma City law firm of Christensen Law Group PLLC. After graduation from Davis High School, he attended college at Harvard, where he got his bachelor’s and master’s degrees in 1973 and 1976 respectively. In 1983, Mr. Howell received his law degree from the OU College of Law. He practices primarily in the area of commercial litigation.

ENDNOTES

1. 51 O.S. 2014 §152(14).
2. Although not the term: see n. 7.
3. 112 U.S. 645 (1884).
4. 36 Mo. 546 (1865).
5. *Pumpelly v. Green Bay & Mississippi Canal Co.*, 80 U.S. 166, 177 (1871).
6. See, e.g., *Southern Kansas Ry. Co. v. City of Oklahoma City*, 1902 OK 63, 69 P. 1050 (relying on the U.S. Fifth Amendment); *City of Oklahoma City v. McMaster*, 1903 OK 25, 73 P. 1012 (same).
7. The term appears to have been used for the first time with its present meaning by the Supreme Court of California in *Tulare Irr. Dist. v. Lindsay-Strathmore Irr. Dist.*, 45 P.2d 972 (Cal. 1935). It was first used in Oklahoma in *Henthorn v. Oklahoma City*, 1969 OK 76, 453 P.2d 1013. Previously the Oklahoma Supreme Court had

used the term “reverse condemnation” for the same concept. See, e.g., *Crowl v. Tidnam*, 1947 OK 112, 181 P.2d 549.

8. *Curtis v. WFEC R.R. Co.*, 2000 OK 26, ¶13, 1 P.3d 996. See also *Oklahoma City v. Wells*, 1939 OK 62, ¶34, 91 P.2d 1077.

9. *Vaughn v. City of Muskogee*, 2015 OK CIV APP 76, ¶5, 359 P.3d 192.

10. *Perry v. Grand River Dam Authority*, 2015 OK CIV APP 12, ¶27, 344 P.3d 1.

11. *Barton v. City of Midwest City*, 2011 OK CIV APP 71, ¶24, 257 P.3d 422; *Material Service Corp. v. Rogers County Comm’rs*, 2006 OK CIV APP 52, ¶7, 136 P.3d 1063.

12. See, e.g., *Greenway Development Co. v. Borough of Paramus*, 750 A.2d 764, 770 (N.J. 2000) (“inverse condemnation is not a tort or an ‘injury’ within the meaning of the TCA”); *Odello Bros. v. County of Monterey*, 63 Cal.App.4th 778, 785-86, 73 Cal.Rptr.2d 903 (Ct. App. 1998) (California’s Tort Claims Act was inapplicable to actions for inverse condemnation because such actions do not sound in tort).

13. *Stedman v. State Highway Commission*, 1935 OK 1028, ¶24, 50 P.2d 657 (a plaintiff is “entitled to maintain the action [for compensation] under the eminent domain provision of the Constitution of the state”). See also *Calmat of Arizona v. State ex rel. Miller*, 859 P.2d 1323, 1325 (Ariz. 1993) (the authority to bring an inverse condemnation suit “stems directly” from the constitutional provision that private property should not be taken without just compensation).

14. *Atchison, T. & S. F. Ry. Co. v. Terminal Oil Mill Co.*, 1937 OK 349, ¶11, 71 P.2d 617. See also *Wohl v. City of Missoula*, 300 P.3d 1119, 1136 (Mont. 2013) (a landowner’s right to bring an inverse condemnation action derives from the “self-executing character” of the takings clause of the Montana Constitution); *Greenway Development Co. v. Borough of Paramus*, 750 A.2d 764, 770 (N.J. 2000) (the constitutional prohibition against taking property without just compensation is self-executing); *Dishman v. Nebraska Public Power District*, 482 N.W.2d 580, 582 (Neb. 1992) (“the constitutional provision which prohibits the state from taking or damaging property without just compensation...[is] self-executing”).

15. *Matter of Conservatorship of Goodman*, 1988 OK CIV APP 16, ¶11, 766 P.2d 1010; see also *Baccus v. Banks*, 1947 OK 322, 192 P.2d 683.

16. 113 P.3d 1024 (Utah 2005).

17. *Id.* at 1025.

18. 113 P.3d at 1026.

19. *Id.*

20. *Id.*, quoting *Colman v. Utah State Land Board*, 795 P.2d 622, 630 (Utah 1990).

21. 750 A.2d 764 at 770.

22. Quoting *Lerman v. City of Portland*, 675 F.Supp. 11, 15 (D. Me. 1987).

23. 578 N.E.2d 380 (Ind. Ct. App. 1991).

24. *Id.* at 381.

25. 845 P.2d 770 (N.M. 1992).

26. *Id.* at 777.